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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation Third Further Notice of Proposed Rulemaking	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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SUMMARY

TCI generally supports the Commission's proposed formula concerning the addition and deletion of channels, subject to earlier stated concerns regarding the rate regulation approach as a whole. To best implement the specific proposal, the Commission should: 1) adopt a clear definition of "programming costs;" 2) make the formula tier specific -- additions or deletions of channels should only affect the price of the specific tier from which programming is added or deleted; and 3) adopt a policy of allowing third parties (i.e., independent accounting firms) to verify that cable operators have made the correct and lawful calculations for the formula instead of forcing cable operators to release proprietary information to local franchising authorities.

Concerning the issue of upgrades made prior to rate regulation, TCI believes that the Commission must allow cable operators with below benchmark rates to recover costs for upgrades initiated or completed shortly before regulation without a full cost-of-service showing. Requiring a full cost-of-service showing for these cable operators is unnecessary because only one key cost factor will be at issue. In addition, the cable operator should be able to choose either alternative the Commission has offered.

TCI also believes that cable operators should be permitted to choose cost-of-service regulation for one tier and benchmark regulation for another tier. The argument that "tier neutrality"

demands a parallel election is unpersuasive because the concept of "tier neutrality" was not designed to ensure that identical rate levels be applied to all regulated tiers. Furthermore, a parallel election will not be more administratively convenient because the operation of a parallel rule could force cable operators to make a cost-of-service showing for both tiers, thereby increasing the administrative burdens on all parties.

Finally, TCI believes that the Commission should permit external cost treatment for costs of upgrades either required or agreed to by franchising authorities. It should be presumed that upgrades mutually agreed to by the franchisor and the cable operator are valid and will benefit subscribers. Passing the costs of these upgrades to the beneficiaries is therefore appropriate. In addition, the external treatment of such costs would be consistent with the Commission's general approach of permitting external cost treatment of costs of franchise requirements.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, files these Comments in response to the Third Further Notice of Proposed Rulemaking in the above-captioned docket.[1]

I. TCI GENERALLY SUPPORTS THE COMMISSION'S PROPOSAL ON ADDING AND DELETING CHANNELS.

TCI generally supports the Commission's tentative proposal for the formula to add and delete channels.[2] While the Commission has proposed a workable formula, it should not escape notice that the proposal adds another layer of complexity to a framework already so multifarious and intricate that it may be unserviceable. To avoid the collapse of the rate regulatory

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[1] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, Third Further Notice of Proposed Rulemaking, FCC 93-428 (released August 27, 1993) ("Third Further Notice").

[2] Id. at ¶¶ 139-144.

scheme, as stated in detail in other TCI pleadings,[3] the Commission will have to undertake extensive and perhaps fundamental changes in the program.

While generally supporting the Commission's proposal, TCI has three specific concerns about the proposed formula. First, there is currently no clear definition of "programming costs." The Commission in the Rate Order stated that the forms for prescribing the precise methodology for calculating and allocating external costs, presumably including programming costs, would be released shortly after May 3, 1993.[4] However, cable operators are still waiting for these forms. A complex or unclear definition of programming costs could have complicating and unintended effects on the proposed formula. Second, if the Commission adopts its proposed formula, basic only subscribers could, for example, experience rate increases when programming is added on the "expanded basic" tier when no programming services have been added to the basic tier. Therefore, the Commission should make the formula tier specific -- additions or deletions of channels should only affect the price of the specific tier to which programming is added or from which it is deleted. Finally, where issues arise over the actual rate adjustments made, the Commission should provide for procedures to protect the

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[3] See generally TCI's Petition for Reconsideration of the Commission's Rate Order in MM Docket 92-266 and TCI's Comments in MM Docket 93-215.

[4] See Rate Order, Docket No. 92-266, 72 Rad. Reg. 2d 733 at n. 604 (1993).

confidentiality of the data in issue. Thus, the Commission should establish a policy of allowing third party verification (i.e., by an independent accounting firm) of rate calculations reasonably put in issue. Using third party verification will both insure that cable operators are acting lawfully and protect the proprietary programming cost information of cable operators.[5]

II. THE COMMISSION MUST ALLOW CABLE OPERATORS WITH BELOW BENCHMARK RATES TO RECOVER UPGRADE COSTS INITIATED OR COMPLETED SHORTLY BEFORE REGULATION WITHOUT A FULL COST-OF-SERVICE SHOWING.

The Commission has requested comment on whether it should allow cable operators with rates below benchmark levels to recover upgrade costs initiated or completed shortly before regulation without the burden of a full cost-of-service showing.[6] TCI supports the Commission's proposal and believes cable operators should be able to choose either alternative the Commission has offered: 1) allowing cable operators to perform a streamlined cost-of-service showing; or 2) allowing cable operators to raise their rates to the benchmark.[7]

TCI believes that requiring a full blown cost-of-service showing for cable operators with rates below benchmark levels to recover upgrade costs initiated or completed shortly before rate regulation is unnecessary. Consistent with TCI's

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[5] The Commission has previously utilized private independent audits to aid in its regulatory responsibilities. See 47 C.F.R. § 64.904.

[6] Third Further Notice at ¶ 145.

[7] Id. In addition, cable operators should still be allowed to present a full cost-of-service showing, if desired.

Comments in the Cost of Service Proceeding,[8] the documentation of key cost factors, including upgrade costs, can be accurately ascertained without a full cost-of-service showing. Moreover, there is no compelling reason to saddle cable operators, franchising authorities, and the Commission with a costly and burdensome full cost-of-service showing when only one key cost factor will be at issue.

In addition, the Commission should not choose only one of the alternatives it has offered. Instead, the Commission should grant cable operators flexibility to make a streamlined cost-of-service showing or raise rates to the benchmark level without any cost showing. If the Commission only allows a streamlined cost-of-service showing, it would be closing off a potentially desirable and administratively simpler alternative for all parties. On the other hand, if the Commission only allows cable operators to raise their rates to the benchmarks, they would be penalizing those operators that can legitimately justify higher than benchmark rates. Flexibility, in this situation, will ultimately be beneficial to cable operators, franchise authorities, and the Commission.

III. CABLE OPERATORS SHOULD BE ALLOWED TO ELECT COST-OF-SERVICE REGULATION FOR A SINGLE TIER ONLY.

The Commission seeks comment on whether cable operators should be permitted to choose cost-of-service regulation for one tier and benchmark regulation for another, or whether parallel

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[8] See TCI Comments in MM Docket No. 93-215 at 64-67.

treatment for both tiers is required in setting initial rates. Third Further Notice at ¶ 146. According to NATOA, a parallel approach would prevent cable operators from "gaming" the Commission's rules and undermining the Commission's intention that the same "reasonable" rate determination be made on both basic and cable programming services tiers. See Petition for Reconsideration and Clarification by NATOA at 29, filed June 21, 1993.

The Commission's proposal to require a parallel election seems driven by two principal concerns: "tier neutrality" and administrative convenience. But parallel treatment does not address either of these concerns. Despite NATOA's contention to the contrary, the tier neutrality concept was not designed to ensure that the identical rate level be applied at all times to all tiers. Rather, tier neutrality was developed in the Rate Order as a rejection of arguments that the regulatory scheme should favor or mandate a low cost basic tier, Rate Order at ¶ 197, and, as articulated in the Third Further Notice, "to simplify the initial rate-setting process, remove a regulatory incentive to retier or move individual channels from one tier to another, and [to] reduce administrative burdens." Third Further Notice at ¶ 140. These concerns generally are separate from the issue of whether the identical rate should be applied to basic and cable programming services tiers. Nowhere in the Rate Order or in any subsequent orders has the Commission stated its intention that its regulatory regime would ultimately

prohibit cable operators from charging different per channel rates for different tiers. In fact, it is inevitable that the tiers will have different prices because: 1) the basic service tier and cable programming services tiers have different dates for initial regulation; 2) there are different principal regulators for the basic service tier and cable programming services tiers; and 3) pass throughs of external costs will vary by tier. Indeed, it is not unreasonable to assume that the Commission has condoned different prices for different tiers in light of these factors.[9]

More importantly, Congress did not intend that the rates for both the basic and cable programming services tiers be the same. Rather, Congress contemplated and enacted different regulatory schemes for basic and cable programming services tiers, with dual jurisdiction between the two tiers. NATOA's claim that parallel treatment is necessary to effectuate an intention to apply the same rate across all tiers is simply incorrect.

Furthermore, as an administrative matter, requiring cable operators to choose cost-of-service or benchmark regulation for both basic and cable programming services tiers will substantially increase administrative burdens, not reduce them.

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[9] Moreover, the Rate Order expressly states that per channel rates between tiers would vary due to programming pass throughs. Rate Order at n. 501. See also, First Order on Reconsideration, MM Docket 92-266 (August 27, 1993), at n. 113 (FCC notes that because the initial date of regulation for the two tiers of cable service may differ, there could be different initial permitted rates for the two tiers).

TCI has publicly stated that it expects to use cost-of-service regulation only rarely.[10] In general, most cable operators will seek cost-of-service showings only where forced to -- that is, where the benchmarks will not cover costs. A uniform election requirement will not deter these operators from submitting cost-of-service showings; they have already made the judgment that they have no choice but to elect this burdensome alternative. In fact, the operation of such a rule would simply assure a doubling of the number of submissions, thereby increasing the administrative burdens on the FCC, local regulators, and cable companies.

Not only does the burden increase by as much as double, it does so without benefit. Where basic or cable programming services prices involve rates within the benchmarks, it would be wasteful for the Commission or local regulators to expend resources to resolve matters that, in reality, are not in dispute. As a policy matter, requiring a cable operator to submit a cost-of-service showing for rates that the government has determined are reasonable, i.e., at or below the benchmark, in order to justify other rates is irrational. Also, a parallel election ignores the possibility that costs will differ among the various tiers of service. Where that is so, it should come as no surprise that cable operators would find it necessary to submit a

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[10] See "TCI Announces Customer Rate Reductions" (TCI News Release, September 1, 1993) (statement of Brendan Clouston -- TCI's Chief Operating Officer: "Except for a handful of locations, we will try to live within the FCC benchmarks and not resort to lengthy and expensive cost-of-service proceedings.")

cost-of-service showing for the costlier tier and would rely on the benchmark scheme for the other tier.

Fears that cable systems will "game" the system or engage in "forum shopping" by placing low cost programming on the tier regulated by benchmarks and expensive programming on the tier for which a cost-of-service showing will be made are excessive. See Third Further Notice at ¶ 149. Under the Commission's regulatory regime, programming costs will be treated as external costs and, therefore, will be passed through directly to subscribers. See Rate Order at ¶ 251. Since cable operators will be able to recover these costs without regard to the tier of service, there is no reason why cable operators would find it economically advantageous to disproportionately place such costs on the tier regulated by cost-of-service. In addition, the "gaming" arguments and proposed "solutions" by the Commission and NATOA come dangerously close to taking editorial control over the placement of programming. Other than inquiries regarding compliance with Section 623(b)(7) -- minimum contents of the basic tier -- the only permissible regulatory inquiry under the statute concerning programming is whether the prices are lawful and reasonable.[11]

Finally, the Commission's proposal to require a parallel election is contrary to the backstop purpose for which cost-of-service regulation is intended. For this reason alone,

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[11] TCI has elsewhere expressed its views on the constitutional questions surrounding Section 623(b), both as written and interpreted by the Commission.

the Commission should not be persuaded by arguments that would threaten or prevent a cable operator from submitting a cost-of-service showing. NATOA's push for a parallel election, however, is an attempt to do just that. The broadly averaged benchmarks can only be sustained if cable operators are free to elect cost-of-service regulation as a safety net. Any attempts to discourage these types of showings would raise substantial constitutional concerns.

IV. THE COMMISSION SHOULD PERMIT EXTERNAL COST TREATMENT FOR COSTS OF UPGRADES REQUIRED OR AGREED TO BY FRANCHISING AUTHORITIES.

The Commission solicits comment on whether it should permit pass throughs of costs for upgrades that are either required or agreed to by local franchising authorities.[12] TCI supports external treatment for these costs. Upgrades mutually agreed upon by both the franchisor and the cable operator benefit subscribers and are pro-consumer. The local franchising authority can be expected to have entered into such agreements only where the benefits are real and substantial. Passing the costs of these upgrades to the beneficiaries is therefore appropriate. On the other hand, refusing to extend external treatment for these upgrades would create disincentives for cable operators to enter into these types of agreements, thereby

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[12] This issue is different from the issue discussed in Section II, supra, of whether cable operators with below benchmark levels can recover the costs of upgrades initiated or completed prior to rate regulation. Here, the Commission is concerned about upgrades required or agreed to by local franchising authorities both before rate regulation and on a going-forward basis.

holding back infrastructure progress and innovation in order to satisfy short term, narrow aspirations. External treatment of the costs of upgrades will promote and encourage continued discussion and negotiation of these mutually beneficial agreements.

In addition, upgrades mandated or agreed to by franchisors are no different from other costs required by the franchising authorities. And, because the Commission allows other costs of franchise requirements to be passed through to subscribers,[13] it would be inconsistent and patently unfair for the Commission to refuse to grant external treatment to the costs of upgrades agreed to or required by the franchising authority and the cable operator. See Third Further Notice at ¶ 153.

Since enactment of the 1992 Cable Act, agreements to upgrade systems have been made by franchising authorities and cable operators. TCI is concerned, however, that unless the Commission establishes an effective date for when external cost treatment will be applied for upgrades, franchisors could refuse to pass through these costs. TCI therefore urges the Commission to establish an effective date of September 30, 1992, so that the

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[13] 47 U.S.C. 542(b)(4) states:

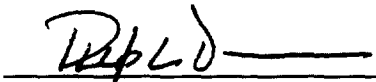
> The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support, public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

costs associated with upgrades required or agreed to by local franchising authorities and cable operators after that date will be subject to external cost treatment.

Finally, the Commission solicits comment on how rate adjustments should be determined if external treatment is permitted for upgrades. See Third Further Notice at ¶ 154. TCI believes that a cable operator should be allowed to make a reasonable demonstration, up to and including full cost-of-service showings at both the local and federal levels in order to determine the proper rate adjustments.[14] This approach will significantly reduce the administrative burdens associated with a full cost-of-service hearing. In order to promote uniformity and administrative convenience, it should apply to all regulated tiers.

Respectfully submitted,

TELE-COMMUNICATIONS, INC.



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[14] This corresponds with TCI's recommendations in the Cost-of-Service Proceeding.